comment on this rather curious piece of advocacy beyond observing that the trial Judge dealt with it correctly in his address to the jury in the following terms :—

" I say to you. Gentlemen, and I say it without fear of contradiction that you can draw no inference against the prosecution case or against the first prosecution witness from the fact that the Deputy Public Prosecutor has not called that particular witness."

It is, of course, well settled that in a criminal case prosecuting counsel, provided there is no wrong motive, has a discretion as to whether or not to call any particular witness and in particular has a discretion not to call in support of his case a witness whom he does not believe to be a witness of truth.

In the case of *Reg.* v. *Woodhead*(7) Alderson B. referred to :—

" The rule which the Judges have lately laid down, that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment."

He went on to say :—

"The witnesses, however, should be here, because the prisoner might otherwise be misled; he might, from their names being on the bill, have relied on your bringing them here, and have neglected to bring them himself. You ought, therefore, to have them in Court, but they are to be called by the party who wants their evidence."

Again, in the case of *Reg.* v. *Cassidy*(8) Parke B. said that he considered the correct principle was :—

" That the counsel for the prosecution should call what witnesses he thought proper, and that, by having had certain witnesses examined before the grand jury whose names were on the back of the indictment, he only impliedly undertook to have them in Court for the prisoner to examine them, as his witnesses."

In the case of *Adel Muhammed El Dabbah* v. *Attorney-General for Palestine*(9) *Lord Thankerton* referred to the cases of *Woodhead* and *Cassidy* and observed :—

" The prosecutor has a discretion as to what witnesses should be called for the prosecution, and the Court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive."

The following year the point was again considered in the case of *Malak Khan* v. *The King-Emperor*(10) and Lord Thankerton repeated in effect what he had said the previous year and said :—

" There is no obligation compelling counsel for the prosecution to call all witnesses who speak to facts which the Crown desire to prove. Ultimately it is a matter for the discretion of counsel for the prosecution.'

The question had been considered by the Privy Council some years earlier in the case of *Seneviratne* v. *R.*(11). In that case Lord Roche (at p. 48) referred to a supposed obligation on the prosecution to call every available witness and then observed :—

" Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination."

In the present case prosecution counsel had in practice no discretion for it would have been impossible for him to call Tan Oon Cheok without causing prejudice to the prisoner wholly disproportionate to the value of the evidence. Either the witness would have told the story that he told at the preliminary enquiry or he would have told a third story. In any of these events one side or another would have been forced to use his statement to the Police or his deposition to discredit him. In the circumstances it would have been bound to come to the knowledge of the jury that he had made a statement to the Police which although it did not directly implicate the appellant definitely corroborated the surrounding evidence of Tan Twa Tin and this was something which inevitably must have operated to the appellant's prejudice had the jury been in any doubt (as apparently they were not) as to the value of Tan Twa Tin's evidence.

Conviction set aside.
Re-trial ordered.

Solicitors: *S. Seenivasagam & Sons.*

THE COMPTROLLER OF INCOME TAX v. J.K.L.

[O.C.J. (Ambrose J.) February 21, 1961]

[Singapore — Suit No. 1627 of 1959]

Income Tax — Suit for tax — Credit for tax paid and subsequently waived — Income Tax Ordinance (Cap. 166), s.84 — Re-opening of original assessment — Power of the Comptroller.

The Comptroller of Income Tax claimed $457,011.87 for income tax and penalties in respect of the years of assessment, 1951, 1952 and 1953. On February 12, 1960, judgment was given for the Comptroller for $446,505.87, which the defendant admitted to be due: and leave to defend was given as to the residue of $10,506.00.

The sole issue was whether the defendant was entitled to be credited with two sums of $5,252.80 each, which he had paid in respect of the years of assessment, 1948 and 1949.

The facts as regards the amount paid for 1948 were these. On or about December 8, 1948, a notice of assessment assessing tax payable for 1948 at $5,392.48 was served on the defendant, who paid the tax without objection. A sum of $139.68 was subsequently refunded, leaving $5,252.80 as tax paid for 1948. On December 23, 1954, a notice of additional assessment dated December 22, 1954, was served on the defendant, assessing the additional tax payable by him for 1948 at $61,052.20. The defendant objected to the additional assessment, but the Comptroller refused to amend it. The defendant appealed to the Board of Review on July 23, 1957. On February 27, 1958, the Board found that the defendant had $500,000 in certain safes on December 31, 1947, and directed that the additional assessment be revised accordingly. The Board had power to do so under section 80 (10) of the Income Tax Ordinance.

* Section 74(3) of the Income Tax Ordinance provides:

"Where complete copies of all notices of assessment and of all notices amending assessments are filed in the office of the Comptroller, they shall constitute the assessment lists for the purpose of this Ordinance."

On August 16, 1958, a notice of amended assessment dated July 9, 1958, was accordingly served on the defendant, combining the original and additional assessments and reducing the total tax for 1948 to $30,299.90. * The defendant appealed to the Board against this amended assessment on August 21, 1958. On March 4, 1959, Mr. O., Assistant Comptroller of Income Tax, agreed with the defendant's solicitor that the defendant's chargeable income for 1948 was nil, and that the tax paid for 1948 should be allowed as a credit against the defendant's tax liability for later years. On May 1, 1959, the Board annulled the amended assessment after considering the arguments and the evidence and the matters agreed between the parties.

Held: (1) when the Comptroller amended the additional assessment for 1948 he had power to re-open the original assessment under the proviso to section 84 of the Income Tax Ordinance, as it was not a matter which had been determined on appeal;

(2) as the original assessment was accordingly re-opened by the Comptroller, the Court must reject the contention that, because the original assessment was final and conclusive, the Assistant Comptroller had no authority to agree that the defendant's chargeable income for 1948 was nil;

(3) as the Board annulled the amended assessment after considering the arguments and the evidence and the matters agreed between the parties, the Board must have found that the chargeable income for 1948 was in fact nil as agreed by the parties; that determination was final and conclusive under section 84 of the Ordinance; and the proviso to that section does not give the Comptroller power to re-open the matter which was determined on appeal by the Board;

(4) the defendant was accordingly entitled to be credited with the amount of $5,252.80 paid by him in respect of the year of assessment, 1948.

The facts relating to the amount of $5,252.80 paid by the defendant for the year of assessment, 1949 were similar to those set out above.

Held: the defendant was also entitled to be credited with the amount of $5,252.80 paid for 1949 for the reasons given above.

CLAIM FOR INCOME TAX.

Lim Chor Pee (Crown Counsel) for the plaintiff.

J. E. Lloyd for the defendant.

Cur. Adv. Vult.

Ambrose J.: This was a claim for balance of income tax in respect of the years of assessment 1951, 1952 and 1953 and penalties amounting to $457,011.87. On the 12th February, 1960, judgment was given for the Comptroller of Income Tax for $446,505.87, which the defendant admitted to be due: and leave to defend was given as to the residue amounting to $10,506.00. The sole issue was whether the defendant was entitled to be credited by the Comptroller with two sums of $5,252.80 each, which were paid by the defendant in respect of the years of assessment 1948 and 1949 respectively, on the ground that the defendant and Mr. O., Assistant Comptroller of Income Tax, subsequently agreed that no tax was payable by the defendant in respect of those years and that the two sums should, therefore, be credited to the defendant.

First, I will deal with the amount paid in respect of the year of assessment 1948. The relevant facts are as follows. On or about the 8th December, 1948, the Comptroller served a notice of assessment dated the 8th December, 1948, on the defendant in respect of 1948, assessing the income tax payable by him at $5,392.48. This amount was paid without any objection or appeal being lodged against the assessment. Subsequently a sum of $139.68 was refunded, and thus the tax actually payable and paid in respect of 1948 was $5,252.80. On the 23rd December, 1954, the Comptroller served a notice of additional assessment dated the 22nd December, 1954, on the defendant in respect of 1948, assessing the additional tax payable by him at $61,052.20. The defendant objected to the additional assessment, but the Comptroller refused to amend it. On the 23rd July, 1957, the defendant appealed to the Board of Review against the additional assessment. On the 27th February, 1958, the Board found that on the 31st December, 1947, the defendant had approximately $500,000 in certain safes at Beach Road and Marine Parade, Singapore, and directed that the additional assessment be revised accordingly. In accordance with this direction, the Comptroller, on the 16th August, 1958, served a notice of amended assessment dated the 9th July, 1958, on the defendant, combining the original and additional assessments and reducing the total tax payable in respect of the year of assessment 1948 to $30,299.90. The defendant objected to the amended assessment but the Comptroller refused to amend it. On the 21st August, 1958, the defendant appealed to the Board of Review against the amended assessment. In January and February, 1959, Mr. O., Assistant Comptroller of Income Tax, in accordance with the standard practice of the Income Tax Department, invited the defendant's solicitor to a conference to explore the possibility of agreeing facts, assessments or computations, with a view to saving time at the hearing of the appeal. A meeting was held accordingly on the 20th February, 1959, at which a certain measure of agreement was reached. On the 4th March, 1959, it was agreed between Mr. O. and the defendant's solicitor that the defendant's chargeable income in respect of the year of assessment 1948 was nil; that no income tax was payable in respect of that year; and that the income tax for 1948 should be allowed as a credit against the defendant's tax liability for later years. On the 1st May, 1959, the Board annulled the amended assessment, after considering the arguments and the evidence and the matters agreed between the parties.

It was contended by counsel for the Comptroller that as no appeal was lodged against the original assessment dated the 8th December, 1948, it was final and conclusive under section 84 of the Ordinance; and that, therefore, the Comptroller had no power to re-open the original assessment in the notice of amended assessment of the 9th July, 1958. Section 84 reads as follows :—

" Except as expressly provided in this Ordinance, where no valid objection or appeal has been lodged

within the time limited by this Part against an assessment as regards the amount of the chargeable income assessed thereby, or where the amount of the chargeable income has been agreed to under subsection (4) of section 76 of this Ordinance, or where the amount of such chargeable income has been determined on objection or appeal, the assessment as made or agreed to or determined on appeal, as the case may be, shall be final and conclusive for all purposes of this Ordinance as regards the amount of such chargeable income;

Provided that nothing in this part shall prevent the Comptroller from making any refund under the provisions of section 93 of this Ordinance or any assessment or additional assessment for any year of assessment which does not involve re-opening any matter which has been determined on appeal for the year."

I rejected counsel's contention as the proviso to section 84 provides that nothing in sections 78 to 84 shall prevent the Comptroller from making any assessment or additional assessment for any year of assessment which does not involve re-opening any matter which has been determined on appeal for the year. On the 9th July, 1958, the Comptroller amended the additional assessment of the 22nd December, 1954, in accordance with a direction given by the Board of Review on the 27th February, 1958: at the same time he combined the original assessment with the additional assessment. In so amending the additional assessment he re-opened the original assessment, but he did not re-open a matter which had been determined on appeal. In my opinion, he had power under the proviso to re-open the original assessment in those circumstances.

It was further contended by counsel for the Comptroller that on the 4th March, 1959, Mr. O. had no authority to agree that the defendant's chargeable income in respect of 1948 was nil, as the original assessment was, on that date, final and conclusive under section 84 of the Ordinance. In my opinion, on that date the original assessment was not final and conclusive as it had been re-opened by the Comptroller on the 9th July, 1958, in the exercise of his power under the proviso to that section. In my view, on the 4th March, 1959, Mr. O. was only concerned with the amended assessment of the 9th July, 1958: this was not final and conclusive, as an appeal had been lodged against it. I, therefore, rejected the contention of counsel for the Comptroller.

It was contended by counsel for the defendant that, as the Board annulled the amended assessment on the 1st May, 1959, after hearing the appeal against it and considering the matters agreed between the parties, the Board must have come to the conclusion that the amount of the chargeable income in respect of the year of assessment 1948 was in fact nil as was agreed by the parties, and that that determination was final and conclusive under section 84 of the Ordinance. I accepted this contention. In my opinion, the proviso to section 84 of the Ordinance does not give the Comptroller power to re-open the matter which was determined on appeal by the Board.

It was for these reasons that I decided that the defendant was entitled to be credited with the amount paid by him in respect of the year of assessment 1948.

The facts relating to the amount paid by the defendant in respect of the year of assessment 1949 were similar to the facts relating to the amount paid in respect of 1948: and the contentions of both counsel were the same as those set out above. I decided, for the reasons given above, that the defendant was also entitled to be credited with the amount paid in respect of 1949. I, therefore, dismissed the claim as to the residue and ordered the Comptroller to pay the defendant his costs of defending the action as to the residue.

Claim dismissed.

Solicitors: *State Advocate-General; Drew & Napier.*

THOMAS v. ATTORNEY-GENERAL OF SARAWAK

[C.A. (Ainley C.J., Lascelles and Briggs JJ.) February 28, 1961]

[Kuching — Civil Appeal No. 12 of 1960]

Practice and Procedure — Costs — Whether advocate should be ordered to pay costs of application — Application for interim injunction supported by affidavit sworn by advocate — Application whether authorised by applicant — O.65 r.11 — Protection of client.

Affidavit — Faulty affidavit — Whether there was failure of duty which occasioned expense to client.

Where, in an application, an advocate swears an affidavit in support of that application as 'counsel for the plaintiff' an order to pay costs was made against the advocate in his personal capacity. On appeal,

Held: (1) an order for costs against the advocate upon the grounds of non-authorisation should not have been made without much fuller inquiry and without affording an opportunity to the appellant to show cause — see *Meyers* v. *Elman* [1] for correct procedure to be adopted;

(2) when at the commencement of proceedings in Court, counsel states that he is instructed, the Court will not inquire into his authority to appear;

(3) neither the advocate nor the firm of advocates which filed the application should be made to pay the costs, as they had made a perfectly honest attempt to keep their client within the jurisdiction pending litigation in which their client was involved.

On the question whether there was a failure of duty which occasioned expense to the client, it was further held:

(4) the application failed on certain legal grounds and not on the faulty affidavit, so that the loss to the client was not the costs of the action, but the cost of swearing a useless affidavit;

(5) in the circumstances of the case, the affidavit was a formality and though wrong, it was pardonable for the appellant himself to state the fact that his client was in prison awaiting deportation and to base his apprehension upon that fact alone.

Obiter: The appellant, by swearing and filing an affidavit and then appearing to argue the application, could not avoid a properly based order as to costs on the grounds that he was in the position solely of a member of the English Bar, practising in England.